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No. 95-_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

ENRIQUE RUVALCABA,

Petitioner,

vs.

CITY OF LOS ANGELES, et al.

Respondents.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF BY POLICE MISCONDUCT LAWYERS REFERRAL SERVICE AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Police Misconduct Lawyers Referral Service (PMLRS), respectfully moves the Court for leave to file the following brief *amicus curiae* in support of the petition for a writ of certiorari filed by Enrique Ruvalcaba. The consent of counsel for petitioner has been obtained, but counsel for respondents has not consented to the filing of this brief.

INTEREST OF *AMICUS CURIAE*

PMLRS is certified by the State Bar of California and has operated as a non-profit agency since 1982 under the auspices of Community Services Unlimited, Inc. Headquartered in Los Angeles, PMLRS provides consultation and assistance to victims of police misconduct throughout Southern California and, when appropriate, it refers victims to private attorneys for representation in civil lawsuits alleging police misconduct.

The PMLRS panel consists of approximately 75 competent attorneys experienced in police

emisconduct litigation.[1] PMLRS holds regular workshops and seminars on various aspects of civil rights litigation to keep its panel attorneys abreast of recent developments in trial tactics and the law. In addition, PMLRS actively seeks to recruit new attorneys for its panel to expand its capacity for representing police abuse victims and to increase the choices available for its clients.

PMLRS often refers relatively small civil rights cases to its panel attorneys. Police misconduct victims with serious injuries generally obtain counsel from the regular plaintiff's personal injury bar. Victims with less serious injuries have difficulty obtaining counsel at all. Without PMLRS, many of these victims would not otherwise obtain legal representation for their cases. Most are members of poor and minority communities, the segments of the population which bears the brunt of police abuse.

The interest of the *amicus* is to assure that developments in the law concerning interactions between police and citizenry which adversely impact large segments of the population receive careful attention. *Amicus* is particularly concerned with

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[1] Mr. Ruvalcaba's trial and appellate counsel, John Burton, is an active member of PMLRS.

encroachments which will especially impact the low income minority population served by *amicus*.

NECESSITY FOR *AMICUS CURIAE* BRIEF

The decision of the Ninth Circuit in *Ruvalcaba* treats as "de minimus" intrusions by the police effecting huge numbers of persons every day, in what is probably the most common interaction between citizens and the police -- the traffic stop. And it does so without paying any recognition to the fact, of which *amicus* is well aware, that police decisions unreasonably to order people about -- like ordering Mr. Ruvalcaba out of the car into the rain -- are most often directed at ethnic minorities and others who have the least power to do anything about it; frequently cause smoldering resentment; and sometimes are the tinder that flares into open confrontations between whole communities and the established order.

The Ninth Circuit decision suffers from a flaw common to many decisions about appropriate police behavior. It is based upon unproven and probably erroneous assumptions of appellate judges about what enhances officer safety and what detracts from it. Rather than examining officer safety questions as

factual matters requiring evidence from knowledgeable sources for their proper resolution, the courts are prone to accept the assertion that the challenged behavior is good for "officer safety" as though it were a sacred mantra, the truth of which is not subject to debate. One result of that unfortunate method of appellate fact finding is that it may result in decisions, like the one here, which promote police behavior which is not good for anyone's safety, including the safety of the police.

Respectfully submitted,

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ARGUMENT

I. FACTS

LAPD officers ordered Enrique Ruvalcaba, a passenger in a car the police pulled over for failing to stop at a stop sign, out of the car. After requiring Mr. Ruvalcaba to get out of the car, an altercation ensued resulting in serious injuries to Mr. Ruvalcaba. The case was tried on the assumption that the police are not permitted to order a passenger out of a car absent some reason. The Ninth Circuit affirmed, however, holding that any passenger can be ordered out of any car legally stopped by the police.

II. THE NINTH CIRCUIT WRONGLY RELIES ON UNPROVEN "OFFICER SAFETY" CONCERNS.

The Ninth Circuit bases its rule permitting police officers to order passengers from cars during routine stops on "officer safety"; yet it does not show how safety is necessarily promoted and it does not deal with the the potential for abuse.

The fact that a " 'weapon can be concealed under the seat of a vehicle.' " 64 F.3d at 1327 (citing *United States v. Salas*, 879 F.2d 530, 535 (9th Cir.), *cert. denied* 493 U.S. 979, 110 S.Ct. 507, 107 L.Ed.2d 509 (1989) is not enough. This "anything is possible" logic can be applied to anyone anywhere; but the Fourth Amendment, through *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968) and its progeny, prohibits discretionary, suspicionless seizures and searches of people.

The issue is not whether the state interest in "officer safety" is both 'legitimate and weighty'; obviously it is.[2] The question is whether police ordering people out of cars for a suspicionless 'roust' does anything to promote it. The courts owe an obligation to both the public and the police to take a true look at the issue, and not to lightly accept or make up "officer safety" rationales to justify intrusive police behavior -- especially where the police themselves cannot agree on whether the behavior in question promotes officer safety or

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[2] Petitioner contends that the state interest in *civilian* safety is equally "legitimate and weighty."

impairs it.[3]

Because of the manner in which the case was litigated – with all parties assuming that reasonable suspicion was required to extract Mr. Ruvalcaba from the car for the intended pat down search – there is no evidence in the record regarding whether as a general matter officers are safer with the passengers inside or outside of cars during routine traffic stops. Normally, that should end the inquiry, since all warrantless activity is presumptively invalid and the burden on the state to establish reasonableness. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *Coolidge v. New Hampshire*, 403 U.S. 433, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). Appellate courts are not necessarily so well informed about matters of police safety (like anything else requiring specialized knowledge) that they should be making decisions which will adversely effect millions of people without a solid basis.

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[3] For example, in a notorious recent, videotaped, sting operation, Long Beach police claimed that former Hawthorne Police Department sergeant Don Jackson "provoked" them into roughing him up and pushing his head through a plate glass window by getting out of a vehicle stopped for a routine traffic violation. The police claimed that officer safety required passengers be kept *in* the car.

This is especially so where the logic of the situation would make it appear that true officer safety concerns in fact point in the opposite direction. The courts should not lightly *encourage* police to do things which both place police unnecessarily at risk and make life more difficult for ordinary people in their day-to-day encounters with the police. There is always the danger that police will rely on mistaken judicial decisions purporting to illuminate officer safety issues. It is not true that the police always know what is best for their own safety; most police fatalities are attributable to police mistakes, frequently based on poor training and erroneous ideas about what promotes officer safety.[4]

The Ninth Circuit's focus on the danger of

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[4] As explained in a study of California peace officers killed during the years 1987, 1988 and 1989:

> Some of these incidents are unforeseeable which no amount of caution or awareness could have prevented. However, in many cases the victim officer influences the outcome due to some action or inaction on the officer's part. In the current study, most of the 19 felonious killing victims could have employed different tactics or equipment which may have prevented their deaths. And 13 of the 22 officers killed in vehicle-related accidents made errors which contributed to their deaths.

California Commission On Peace Officer Standards and Training, CALIFORNIA PEACE OFFICERS KILLED IN THE LINE OF DUTY 1987-1988-1989 page 2 (August 1992).

police shooting is unnecessarily alarmist. One should not base decisions about how the police will treat millions of people based on erroneous assumptions about the true dangers. Modern police officers do not spend their days in pitched gun battles; the overwhelming majority spend their careers without getting shot at or shooting anybody. Yet the panel's decision approaches Fourth-Amendment balancing as if modern society were a Schwartzenegger action film. Studies establish that, contrary to popular myth, police work is not significantly more dangerous than the average job.[5] According to the Annual Statistical Digest published by the Los Angeles Police Department, in 1991 – the year of this incident – only one LAPD officer was killed in the line of duty "by a felonious act." (Two others died in accidents.) A police officer is only slightly more likely to be murdered than any

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[5] The statistics for injuries and fatalities tell us that policing is a relatively safe occupation compared with fire fighting, shipbuilding, or forestry. The incidence of fatal injuries and injuries involving days lost from work for police is reported as 2.37 events per 100 workers for 1987. The national (U.S.) rate for all industries was 1.86. But policing was safer than fire department work (5.36); ship and boat building (4.20); or forestry (4.10).

Geller & Scott, DEADLY FORCE: WHAT WE KNOW 23 (Police Executive Research Foundation 1992).

other American.[6] Indeed, since the widespread implementation of Fourth-Amendment restraints police work has become increasingly safer; as of 1989 and 1990, "American police were less likely to be killed in the line of duty than at any time in the past three decades."[7] Activities which might seem dangerous to lay persons are, in fact, relatively safe.

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[6] In 1990, when 11.1 American police were feloniously slain per 100,000 officers, the murder/nonnegligent manslaughter rate for the general population was 9.4 per 100,000. [Reference to table omitted.] In 1991, the rates changed to 11.9 for police slain and 9.8 for general population homicides. [Reference to table omitted.] Compared in this way, police were approximately 1.2 times more likely than other Americans to be murdered in 1990 and 1991 -- a relatively small difference.

Geller & Scott at 124. The absolute numbers are small as well. Nationally, in 1994 only 75 of more than 700,000 officers were shot to death in the line of duty. That is one-quarter the number which committed suicide during the same time period. *More Police Died in Suicides Than in Line of Duty,* Los Angeles Times, Dec. 31, 1994, p. A34.

[7] This fact runs contrary to another popular myth. "[O]fficers were not only less likely (based on their numbers on police forces) to get killed over time; they were less likely to be assaulted with the variety of guns, knives, and other dangerous weapons . . . ." Geller & Scott at 130. This trend tends to disprove the concern voiced by Justice Stevens in his *Mimms* dissent that "almost every decision . . . holding that an individual's Fourth Amendment rights have been invaded makes law enforcement somewhat more difficult and hazardous." Instead of expressing such concern, civil-rights minded judges should be congratulating themselves; in the opinions of many experts, sensible judicial restraint on police conduct makes police-civilian confrontations safer for both sides.

For example, 8,681 LAPD arrests for *robbery* resulted in only 18 assaults, nine with firearms.[8] *Id.* In fact, of the 1056 assaults on LAPD officers reported in 1991, 728 were with fists and feet, compared to 150 with firearms. Passengers seated in a car cannot punch or kick effectively. None of the felonious killings of California peace officers in the years 1987 through 1989 arose out of routine traffic stops. CALIFORNIA PEACE OFFICERS KILLED IN THE LINE OF DUTY , *supra*, at page 13.

The Ninth Circuit ratchets up the problem of appellate judges deciding what is good for officer safety, recognized by Justice Stevens in his *Mimms* dissent, a notch higher. Justice Stevens called the majority's "assumption about police safety . . . dubious at best." *Mimms*, 434 U.S. at 117, 98 S.Ct. at 337. He quoted law enforcement authorities which instruct officers to try to keep drivers in the car during traffic stops, rather than extracting them. *Id.* at 119 n. 10, 98 S.Ct. at 337 n. 10. He analyzed the same authorities cited by the panel, 64 F.3d at

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[8] Only a small number of assaults result in actual injury to an officer. Of the 150 reported assaults on LAPD officers with firearms in 1991, six resulted in claims of personal injuries. Of the 1056 total assaults, only 148 resulted in injuries to officers. *Id.* In 99.94% of the more than 232,000 LAPD *arrests* in 1991 (adult and juvenile), there was no injury to an officer. Undoubtably, approaching cars for minor traffic infractions is many times safer.

1327, regarding the danger of police shootings during vehicle stops, showing that it did not seem to support broad officer safety claims. *Mimms*, 434 U.S. at 118-119, 98 S.Ct. at 337. Now, a similar debatable proposition about what is safe and what is not stretches police discretion even further.

Moreover, as explained by Judge Burns in his separate opinion, 64 F.3d at 1329, the *Mimms* majority did not base its holding just on the highly remote possibility that a driver might kill an officer rather than respond to a traffic ticket. It included within "officer safety" the less exotic but far more practical concern[9] that the necessary physical juxtaposition of the officer to the automobile's driver side window – if the driver is allowed to remain seated during the citation process – creates an unnecessary risk of being hit by a car. *Mimms*, 434 U.S. at 111, 98 S.Ct. at 333. Since there is generally no need for the police to talk to the passengers, and because passengers are more likely to be away from traffic on the right hand side of the

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[9] In the years 1987, 1988 and 1989, half again as many California peace officers were killed accidentally (32) than feloniously (19). CALIFORNIA PEACE OFFICERS KILLED IN THE LINE OF DUTY 1987-1988-1989, *supra*, page ii. Of those accidentally killed, the third most common type incident was a pedestrian officer being struck by a vehicle (5 of 32). *Id.* at 42.

car, there is generally no reason to pull passengers out of the car.

It is also important to take into consideration that appropriately *restricting* officers' discretion may save officers' lives. Unreasonably ordering people about, like using unreasonable force, provokes reactions. By way of illustration, since *Tennessee v. Garner* 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985) restricted the use of force *by* police, despite increases in the general level of interpersonal violence, the use of force *against* police has dropped. Samuel Walker, TAMING THE SYSTEM 32 (Oxford, 1993); W. Geller and M. Scott, DEADLY FORCE, WHAT WE KNOW 127 (Police Executive Research Foundation 1992) ("American police were less likely to be killed in the line of duty than at any time in the past three decades."). According to Professor Walker, one reason for the reduction in shootings *of* police are restrictions on shootings *by* police. "The general trend has been a long downturn in police officers killed in this country. . . . That's a result of new rules on police use of deadly force. What that means is that police are shooting less, and consequently, fewer bullets are coming back the other way." *Police feel ever more vulnerable*, Los Angeles Daily News, Feb. 28, 1994,

p. 28. *See also* J. Fyfe, *Administrative Intervention on Police Shooting Discretion: An Empirical Examination*, 7 J. CRIM. JUST. 309 (1979). As a general rule, good police work entails the *avoidance* of unecessary conflict -- including the avoidance of arbitrary actions like ordering passengers out of cars for no good reason. It is a mistake to encourage police to provoke unnecessary conflicts with mistaken assumptions about what is good police work and what is not.

Arguments for expanding police discretion often arise not out of the realties of police work, but from a desire to free the police from accountability, *i.e.*, to avoid compensating the victims of unnecessary and hence unreasonable police conduct. The reasoning is that if there is very broad discretion (no standards and no accountability), it will be harder to convince jurors and judges, fearful of crime and invested in trusting the police, that questionable police behavior is "unreasonable." In our adversary system, such advocacy is to be expected because it works in the short term. The problem is, however, that lack of accountability ends

up costing more in the long run.[10] The way police handle a routine traffic stop may seem like something that shouldn't make much difference; but it does. If for no other reason, one has to figure that eventually it will turn up on somebody's video tape.

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[10] Just the monetary costs of police misconduct are very large. *See, e.g.*, James G. Kolts & Staff, THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT 26 (July, 1992) ("In less than three and one-half years, from January 1989 to the end of May 1992, the settlements and verdicts in all excessive-force cases against the Department totalled $15,492,971.85."); McGladrey & Pullen, *et al.*, COUNTY OF LOS ANGELES RISK MANAGEMENT AND LIABILITY COST STUDY (July 30, 1993) at p. 19 *et seq.* (showing that legal defense costs equal or exceed settlements and verdicts); REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 56 (1991) ("From 1986 through 1990,
the City paid in excess of $20 million in judgments, settlements, and jury verdicts in over 300 lawsuits against LAPD officers alleging excessive use of force. This amount does not include the cost of defending these suits."); September 1, 1995 Los Angeles Daily Journal, *Verdicts & Settlements*, at page 4 (award of $15,954,161.00 to 36 plaintiffs against 23 Los Angeles County Sheriff's Deputies for false arrests and excessive force); September 15, 1995 Los Angeles Daily Journal, *Verdicts & Settlements*, at page 3 (award of $611,522 to 3 plaintiffs against, *inter alia*, Sheriff Sherman Block, Undersheriff Jerry Harper and former Undersheriff Robert Edmunds for deliberate indifference to the use of excessive force by Sheriff's deputies).

CONCLUSION

For the foregoing reasons, PMLRS, as *amicus curiae*, respectfully urges that the Court grant the petition for certiorari and issue the writ to the Ninth Circuit Court of Appeals.

Dated: January 31, 1996

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